NO. 74-231

OCT 1 1974

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

R. J. ADAMSZEWSKI, F. BECKER, P. BORN, C. BRAMMEL, RAY BROO, GERALD O. CROCETTI, RAY FLAKUS, PAUL GARZA, CECIL H. LEGATE, STEVE MANKO, ALBERT T. MARINO, WILLIAM McCLARY, GREGORY A. PANKOW, M. PELOSE, RICHARD PLETT, R. RUSSELL, ARDITH A. SMITH, HERBERT W. SUNBERG, and all other Northwest Airline, Inc. employees and all other persons who have been notified to appear for a certain "trial" on January 31, 1972 at 50 West Oakton Street, Des Plaines, Illinois,

Petitioners,

vs.

LOCAL LODGE 1487, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, THOMAS PAUL, WILLIAM AUSTIN, KEN THIEDE, and MICHAEL J. PEAT,

Respondents.

BRIEF FOR LOCAL LODGE 1487, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, THOMAS PAUL, WILLIAM AUSTIN, KEN THIEDE, AND MICHAEL J. PEAT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

I. Whether Northwest Airlines, Inc. is an "interested employer" within the meaning of 29 U.S.C. Sec. 411 (a)(4) so that its direct financing of this litigation

is violative of the second proviso of Section 411(a)(4) and whether this action so financed can be maintained pursuant to 29 U.S.C. Sec. 412.

II. Whether petitioners are entitled to injunctive relief where there is no showing of irreparable harm or inadequacy of legal remedies and whether such injunctive relief can be based on a System Board of Adjustment Award which expressly excluded consideration of matters of discipline of individual members which was the basis of the complaint herein.

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct except as follows:

1. The statement that Petitioners filed this suit to enjoin the disciplinary proceedings "seeking to avoid the *in terrorem* effect of the union trials" (Pet. Br. p. 6) is open to serious question as a statement of fact. In view of the stipulation filed in this cause that Northwest Airlines, Inc. (NWA) financed the litigation (Pet. Br. p. 7), it appears that the active role was NWA's.

2. The order entered on January 26, 1972 by the district court was an agreed order providing that Respondents would hold in abeyance the disciplinary proceedings complained of until "final disposition of the issues and matters" of this case (App. 62-4)[1]

3. The court below stated in a dictum that the second proviso of 29 U.S.C. Sec. 411(a)(4) does not preclude relief sought pursuant to the Railway Labor Act (Pet. Br. p. A15). However, the court below *held* that the SBA

[1] Refers to the Appendix filed in the court below.

Award in the case at bar "will not support the relief requested by appellants" because that decision was not based on any consideration of matters of discipline of individuals as contrasted to determination of whether the International Association of Mechanics and Aerospace Workers (IAMAW), in the light of the no-strike provisions in the collective labor agreement with NWA, retained the right to instruct its members to honor the picket lines of a sister union.

REASONS FOR DENYING THE WRIT

Petitioners urge as a reason for granting this writ the multiplicity of litigation arising out of the fact situation in the case at bar. They draw the Court's attention to six cases arising from those facts. As NWA is financing the litigation in the case at bar, it is reasonable to infer that it is financing the companion litigation as well.[2] Thus, the "multiplicity" referred to by Petitioners is more illusory than substantive; nor does such alleged "multiplicity" without more present questions requiring decision by this Court where there is no conflict between the courts of appeal which have decided the cases arising out of the same fact situation.[3]

The second reason advanced by Petitioners for granting the writ is equally without merit, when examined free of Petitioners' rhetoric (see last paragraph, Pet. Br. p. 9). The lurid language in the last sentence of the paragraph referred to and denominated as a recurring question of union conduct "in violation of law and contract by disciplining members for working under a no-

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[2] See *Verville, et al.* v. *IAMAW, et al.* ..... F. Supp. ....,... (E.D. S.D. Mich., 1974) (Pet. Br. A35).

[3] The case below, 496 F.2d 777 (7th Cir. 1974), *Buzzard* v. *Local Lodge 1040*, etc., 480 F.2d 35 (9th Cir. 1973).

strike contract and unilaterally disregarding a no-strike and no-reprisal agreement (Pet. Br. p. 10) must be read in conjunction with the affidavit of IAMAW Vice-President Winpisinger (App. 107-09). That affidavit sets out the facts that the Guidelines, Paragraph VI (what Petitioners refer to as the no-reprisal agreement) contained the word "fines" as first drafted and that word was eliminated in the language agreed upon, and that the President of NWA had agreed that paragraph VI would not apply to any action taken under the IAMAW Constitution against a member. The charges against Petitioners of conduct unbecoming union members (App. 17-35) were predicated on the IAMAW Constitution. That constitution provides for hearing of such charges by a trial committee of a local lodge, report of the trial committee to the local lodge, which decides on the charges and further provides for appeal from the decision of the local lodge to the IAMAW President and an appeal from that officer to the IAMAW Executive Committee. Appeal may be taken from the executive committee to the Grand Lodge Convention of the Union or to the membership at large by submission to a referendum (App. 101-104).

As this litigation was disposed of below *in limine* on Respondents' motion for summary judgment treated by the district court as a motion to dismiss raising matters in abatement there was no determination of the fact as to whether NWA and IAMAW had entered into a "no-reprisal agreement". That is Petitioners' characterization. The lack of any finding of fact in this record as to whether or not a "no-reprisal agreement" exists which prohibited charges under IAMAW constitution forces the conclusion that this case does not present an opportunity for this Court to determine any question of federal labor law.

I.

The Court below's denial of injunctive relief raises no constitutional or federal question.

Petitioners contend that Paragraph VI of December 8, 1970 unsigned "Guidelines Agreement" between NWA and IAMAW constitutes a "no-reprisal agreement" under the facts of the case at bar and predicate their petition on the assumption that the agreement was a proven fact in the Court below. The issue was joined as to whether the alleged "no-reprisal agreement" was such an agreement in the trial court (App. 96-97, 107-121) but was not passed upon by either the district court or the court below because the district court dismissed the action (Pet. Br. A27) and the court below affirmed. Thus, it is clear that there was no determination on the merits of Petitioners' contention that Paragraph VI is in fact such a "no-reprisal agreement". This leads to the obvious conclusion that Petitioners' argument for injunctive relief to enforce what they contend is a "no-reprisal agreement" stands on a pillar of sand.

Secondly, Petitioners contend that the System Board of Adjustment Award provides them with a ground for injunctive relief. The short answer to this contention is given by the court below when it stated:

> "However, the SBA award will not support the relief requested by appellants. The SBA decision expressly stated that the award was not based on any consideration of 'matters of discipline *** of individuals for refusing to cross picket lines of sister unions.' Opinion of NWA/IAMAW System Board of Adjustment 5 (1970). Rather, the focus of the SBA was on the no-strike clause and its effect on union conduct. *Id.* at 2, 4, 5 The issue presented to the SBA by the Court of Appeals for the Eighth Circuit was:

> [W]hether IAM, in the light of the no-strike provisions of the bargaining agreement retains the right to instruct its members to honor the picket lines of a sister union.

Northwest Airlines, Inc. v. *International Association of Machinists and Aerospace Workers,* 442 F. 2d 244, 246 (8th Cir. 1970). The decision reached by the SBA was that IAM did not retain the right to instruct its members to honor the picket lines of a sister union. Opinion of NWA/IAMAW System Board of Adjustment, *supra* at 11. Therefore, the SBA award is limited in scope and it does not give appellants a cause of action to enjoin the disciplinary hearings. Since the injunctive relief sought could not be based on the SBA award, the district court committed no error in dismissing that claim. *Accord, Buzzard* v. *Local Lodge 1040 International Association of Machinists and Aerospace Workers, supra* at 40." (Pet. Br. A16-17)

Furthermore, the court below determined that Petitioners failed to show that they had no adequate remedy at law and that they would suffer irreparable harm. Such irreparable harm, as Petitioners allege, arising from the proposed disciplinary proceedings to their standing as member of IAMAW and to their employment by NWA was completely speculative. The court below stated:

> "None of the [petitioners] has had to undergo disciplinary hearings in this matter. None has been fined, suspended or in any way sanctioned by the union. It is anomalous for appellants to argue that their employment with NWA may be jeopardized when, in fact, NWA is financing this suit. Similarly, it is difficult to see how [petitioners'] position within the union will be jeopardized to any greater extent by requiring them to attend the disciplinary

proceedings than it would be by issuing an injunction in their behalf against the holding of such proceedings." (Pet. Br. A18-19).

Petitioners make the accurate statement that both the court below and *Buzzard, supra,* held that the SBA award does not support a cause of action for injunctive relief (Pet. Br. p. 13). What they fail to point out to this Court, however, is that both the Seventh and Ninth Circuit Courts of Appeal analyzed the SBA award as having no application to the case at bar, dealing, as that award did, only with union conduct and not conduct of individual union members, the subject matter of the case at bar.

The logical conclusion, therefore, is that all of Petitioners' discourse on pages 13 to 16 of their brief is without point because it is all directed towards the judicial enforcement of *applicable* SBA awards. The SBA award here is not applicable to the case at bar by the express terms of the award itself. It follows, therefore, Petitioners have no cause of action for injunctive relief based on the SBA award in the case at bar.

II.

The Court below has correctly construed 29 U.S.C. Sec. 411(a)(4) in holding NWA an "interested employer."

The court of first instance dismissed Petitioners' action on Respondents' motion for summary judgment treated as a motion to dismiss which raised the matter in abatement of NWA financing this litigation contrary to the second proviso of U.S.C. Sec. 411(a) (4). The court below affirmed and in a closely reasoned analysis of the legislative history of that section (Pet. Br. A8-15)

held that the district court committed no error in deciding that the second proviso of 411(a) (4) barred this cause of action (Pet. Br. A14-15). Respondents rest on the court below's analysis of the legislative history of this section and the court below's statement adopting respondents' contentions in holding that NWA is a "directly interested" employer in this litigation.

Petitioners rely on *Farowitz* v. *Associated Musicians of Greater N.Y., Local 802,* 241 F. Supp. 895 (S.D.N.Y. 1965) as they did in the court of first instance and in the court below. The court below distinguished *Farowitz* from the case at bar (Pet. Br. A10) as did the district court (Pet. Br. A26).

In addition to the reasons cited by the court below distinguishing *Farowitz* from the case at bar that case is distinguishable on several additional grounds:

1. In *Farowitz* the plaintiff was expelled from the union and the court found that he was thus denied the right to pursue his career as a musician (241 F. Supp. 909). Here petitioners' employment by NWA and membership in IAMAW and the respondent local lodge is in no way affected (App. 96-6, 105-06).

2. In *Farowitz* the plaintiff denied that he was getting any support from his employer or employer organization (241 F. Supp. 903). In the case at bar petitioners "freely concede that NWA is financing" this litigation (Pet. Br. p. 17).

3. In *Farowitz* the court found that the plaintiff had no knowledge that his employers were aiding in his prosecution of that suit (241 F. Supp. 909). Here the petitioners have knowledge of the fact of NWA's participation.

4. In *Farowitz* the court predicated its holding on whether the employer there was an "interested

employer" under the second proviso of 411 (a) (4) on the absence of knowledge on the part of the plaintiff that he was being employer-aided in that litigation. The court stated (241 F. Supp. at 909):

> "In the absence of knowledge on the part of *Farowitz* that [the employers] were aiding in the prosecution of this suit, I cannot conclude that his right to sue would be imperilled by anything they did. This is consistent with the policy of construing provisos strictly to preserve the general policy of the enacting clause of the provision. In conclusion, the plaintiff has suffered a substantial wrong against which there is no valid defense. He is entitled to pursue music as a career if he wishes without interference with his right of free speech."

Petitioners' reliance on *Farowitz,* so clearly distinguished from the case at bar, should be no more availing before this Court than it was before the court below. They attempt to overcome the court below's reasoning distinguishing *Farowitz* by observing the court's analysis as to the reason for the participation of NWA in this litigation by financing it for the purpose of promoting the interest of dissidents against their union is unrealistic (Pet. Br. p. 19). The naivete of that statement is compounded by Petitioners' argument that "a union's representational strength depends upon the fair treatment which it accords its members within the confines of the law * * *. The solidarity and moral fiber of the union will be strengthened by a decision which holds the union and its hierarchy to its lawful obligations. A government of laws has never been considered as divisive as one of men" (Pet. Br. pp. 19-20).

While recent events in our national history lead Respondents to agree that a government of laws is less divisive than one of men, the simple unvarnished truth in the case at bar is that NWA is financing this litigation so that Petitioners and likeminded employees in the NWA system may refuse to comply with their bargaining representative's direction of concerted activity without penalty.

The rationale of the second proviso of Section 411(a)(4) is consistent with the entire scheme of the national labor policy which statutorily encourages collective bargaining by exclusive representatives chosen by the majority of employes in an appropriate bargaining unit. If the prohibition against an interested employer financing and encouraging legal action by its employees against their collective bargaining representative were not enforced, the NWA could and (as demonstrated here) would undermine the authority and discipline of IAMAW in the crafts and classes of which Petitioners are a part.

Why Congress prohibited interested employers from financing or encouraging litigation (in which employers are not a party) by employees who sue labor organizations of which they are members as a concomitant part of the national labor policy is illustrated in *NLRB* v. *Allis Chalmers Manufacturing Company,* 388 U.S. 175 (1966). This Court concluded that a union did not commit an unfair labor practice by fining a member for crossing a picket line established by that union. While the picket line crossed here was that of a sister union, the underlying principles are equally applicable. The Court stated (388 U.S. at 182):

> "National labor policy has been built on the premise that by pooling the economic strength and acting through a labor organization freely chosen by the

majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . .' *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 202 . . . *The employee may disagree with many of the union decisions but is bound by them.* 'The majority-rule concept is today unquestionably at the center of our federal labor policy.' 'The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338. . . . *Integral to this federal labor policy has been the power in the chosen union to protect against erosion* [*of*] *its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.* That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving the agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . .' *Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.*" (Emphasis supplied)

We add, and also at the time of enactment of LMRDA on the same date.

The concept of a union's self-protective discipline power over its members is expressed in the proviso of 29 U.S.C. Sec. 411(a) (2) insofar as that section shall not

> "• • • • be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibililties of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

That IAMAW shall be able to effectively represent its membership, the provisions of the IAMAW Constitution (App. 101-04) conferring the right on fellow members to charge the Petitioners with conduct unbecoming members of the union and the right of the respondent local lodge to discipline them on their being found guilty, must not be negated.

It is submitted that this is so even though it was subsequently determined by the SBA that the IAMAW did not retain the right to instruct its members not to cross a picket line in view of the no-strike agreement with NWA. Otherwise, Petitioners and other members of the respondent local lodge would be invited to second-guess their union leadership and make their own determination as to the validity of a union directive in NWA-financed litigation. In that event NWA would certainly consider its investment in this litigation paying handsome dividends.[4]

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[4] Compare *Cox* v. *Northwest Airlines, Inc.*, 319 F. Supp. 92, 94-95 (D. Minn. 1970) NWA's financing the litigation here bears striking similarity to the obligations it assumed in *Cox*.

It is further submitted that the Court should take judicial notice of the mutual aid pact approved by the Civil Aeronautics Board[5] of which pact NWA is a member and under which the non-struck signatories-carriers by air contributed cash payments to NWA during the period of the Brotherhood of Railway and Airline Clerks (BRAC) strike against NWA. The effect of this arrangement was to materially reduce the economic impact of the BRAC strike. IAMAW in its own self-interest, as representative of NWA employees, including Petitioners, determined on the policy of assisting BRAC because if NWA, with the assistance of the mutual aid pact payments should successfully resist the BRAC strike IAMAW's economic strength, as a representative of NWA employees, would be materially lessened. Thus, it is submitted, IAMAW's instructions to its members to not cross BRAC picket lines when issued were "in good faith" and had "honesty of purpose" on or about July 8, 1970 at the commencement of the BRAC strike. It was on December 14, 1970 that SBA reached the conclusion that IAMAW did not retain that right in light of its no-strike agreement with NWA (App. 46).

Finally, Petitioners argue that whatever interest NWA may have in the litigation it cannot rise to the status of being an "interested employer" within the meaning of the second proviso of Section 411(a) (4) because the "real concrete interest involved in this case involves solely the employees who have been summoned to trial" (Pet. Br. p. 20). This argument has a hollow sound in view of the fact that it is only NWA, in its financing this litigation who is complaining. The district court

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[5] 29 Civil Aeronautics Board Reports 168; See dissent Members Minetti 29 CAB 170; text of pact 29 CAB 190. NWA became a signatory on or before March 7, 1960, 31 CAB 977.

dismissed this litigation without prejudice to Petitioners' right to commence further action not financed by NWA (Pet. Br. A27). This has not been done to date though the invitation was issued to Petitioners nine months ago.

CONCLUSION

There is no confusion existing in the federal judiciary in construing and applying the second proviso of 29 U.S.C. Sec. 411(a) (4) to the facts in the case at bar. The decision of the court below and of the Ninth Circuit in *Buzzard,* supra, are in accord on nonavailability of injunctive relief to the petitioners. *Buzzard* did not consider or construe the second proviso in 29 U.S.C. Sec. 411(a) (4) as that contention was not raised in that case (480 F. 2d 35 at 39, f.n. 13). Whether or not Paragraph VI of the Guideline Agreement of December 8, 1970 is applicable to the case at bar has not been determined on its merits. The SBA award is clearly shown to be not applicable to the case at bar by its own terms. Thus, this case presents no "important and recurrent questions of federal labor law" and Respondents respectfully request this Court to deny the petition for a writ of certiorari to be issued to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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